

HB 104 - Criminalizing Offenses Involving Death to an Unborn Child

Mr. Chairman and members of the committee

My name is Laura d'Esterre – D'ESTERRE – I am the Culture of Life Spokesperson for the Montana Catholic Conference which represents the 2 Catholic bishops of Montana in the public policy arena. I am here in support **House Bill 104 – Criminalizing Offenses Involving Death to an Unborn Child**. I formerly worked at the Florence Crittenton Home here in Helena for approximately seven years. I worked closely with young women from the at-risk environments addressed by this bill.

I will limit myself to 3 main points:

- 1) This bill is consistent with the federal law, in both scope and terminology, and has already been passed in 38 other states.
- 2) This bill will not cause tension or conflict with already existing abortion legislation; rather it reinforces a woman's right to choose.
- 3) The increase in violence against women during pregnancy requires more serious consequences for battering, especially when it results in death of an unborn child.

~ FIRST

This bill aligns Montana with at least ⁽¹⁾₃₆ other states **and with federal law**, recognizing fetal homicide in the same degree. This is not a unique or new approach to legislation. The language used in this bill is consistent with federal law, an act titled "Unborn Victims of Violence Act of 2004." This federal law already holds jurisdiction in Montana on military bases and Reservations. The majority of states recognizing fetal homicide find the mother immune from prosecution. This bill specifically indicates exclusion of the mother, eliminating concerns for "unintended consequences."

~ This leads to my Second point

This law will not erode or create tension with "*Roe v. Wade*" and abortion case law. In *Case Western Law Review* of 2010, Juliana Vines Crist addresses the perception of tensions between *Roe v. Wade* and Fetal Homicide. She clarifies that fetal murder laws do not bestow constitutional personhood simply by extending protection to unborn children. States protect particular entities even when the entity itself possesses no rights. Furthermore, the distinction between a woman consenting to an abortion and an intrusive attack on a woman to end a pregnancy is clearly dissimilar, since the woman has a right to act while the attacker does not. (Juliana Vines Crist, 2010 pg 860-861) Fetal Homicide Legislation supports the woman's right to reproductive autonomy as it affirms her right to determine the outcome of her pregnancy.

~ The third and final point I wish to emphasize is this:

Domestic violence increases against women during pregnancy. Consequently, more serious penalties for battering during pregnancy are needed when the death of an unborn child results. In 2004, *The Journal of Family Violence* indicates that out of every five pregnant women, two of them

report violence. In some cases, the onset of violence is due to the pregnancy. (Burch, Rebecca, and Gallup, Gordon, pg 243) Studies show that a woman's stake in the pregnancy leaves her vulnerable to subordination as she attempts to protect a life that is unprotected by the law. Failure to protect the desired pregnancy of a woman does considerable harm to the woman herself by limiting her protection. Without decisive consequences for the loss of her unborn child through violence, oppressive reminders perpetuate that she is unable to protect the life and choice she has made. (Tuerkheimer, 2006) This bill potentially deters violence during pregnancy with the added risk of committing homicide when battering a woman *at the risk of killing the fetus.* and her unborn child.

So, for these reasons, we encourage you to SUPPORT HB 104.

"Unborn Victims of Violence Act of 2004."¹ Codified at 18 USC 1841, this section is titled "Protection of unborn children" and in multiple instances states the term "**unborn child**," which is the exact term HB 104 uses. For example:

Subsection (B)(ii) of this law states: An offense under this section does not require proof that-- the defendant intended to cause the death of, or bodily injury to, the **unborn child**.

Subsection (C) also reiterates the term. It states: If the person engaging in the conduct thereby intentionally kills or attempts to kill the **unborn child**, that person shall instead ... be punished... for intentionally killing or attempting to kill a human being.

The federal law further defines the term '**unborn child**' to mean "a child in utero, and the term 'child in utero' or 'child, who is in utero' means a member of the species homo sapiens, **at any stage of development, who is carried in the womb.**" This definition is also consistent with the definition of unborn child which is found in this bill.

Montana Code Annotated:

41-1-103. Unborn children. A child conceived but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth.

42-2-201. Definitions. As used in this part, unless the context requires otherwise, the following definitions apply:

(1) "Child" includes an **unborn child**.

50-20-104. Definitions. As used in this chapter, the following definitions apply:

(5) "Informed consent" means voluntary consent to an abortion by the woman upon whom the abortion is to be performed only after full disclosure to the woman by:

(a) the physician who is to perform the abortion of the following information:

(ii) the probable gestational age of the **unborn child** at the time the abortion is to be performed

50-20-303. Definitions. As used in this part, unless the context requires otherwise, the following definitions apply:

(3) "Pregnant" or "pregnancy" means that female reproductive condition of having an **unborn child** in the woman's body.

(4) "**Unborn child**" means the offspring of human beings from conception until birth.

Other notable USSC cases, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992), and *Gonzales v. Carhart*, 127 S. Ct 1610 (2007), both recognize that the State "has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus" ... as well as an interest "in promoting respect for human life at all stages in the pregnancy."

FEDERAL LAW:

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Unborn Victims of Violence Act of 2004' or 'Laci and Conner's Law'.

SEC. 2. PROTECTION OF UNBORN CHILDREN.

¹ <http://news.findlaw.com/wp/docs/abortion/unbornbill32504.html>

IN GENERAL- Title 18, United States Code, is amended by inserting after chapter 90 the following:

CHAPTER 90A--PROTECTION OF UNBORN CHILDREN

Sec. 1841. Protection of unborn children

`(a)(1) Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365) to, **a child, who is in utero** at the time the conduct takes place, is guilty of a separate offense under this section.

`(2)(A) Except as otherwise provided in this paragraph, the punishment for that separate offense is the same as the punishment provided under Federal law for that conduct had that injury or death occurred to the unborn child's mother.

`(B) An offense under this section does not require proof that--

`(i) the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

`(ii) the defendant intended to cause the death of, or bodily injury to, the unborn child.

`(C) If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall instead of being punished under subparagraph (A), be punished as provided under sections 1111, 1112, and 1113 of this title for intentionally killing or attempting to kill a human being.

`(D) Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section.

`(b) The provisions referred to in subsection (a) are the following:...

`(c) Nothing in this section shall be construed to permit the prosecution--

`(1) of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

`(2) of any person for any medical treatment of the pregnant woman or her unborn child; or

`(3) of any woman with respect to her unborn child.

`(d) As used in this section, the term 'unborn child' means a child in utero, and the term 'child in utero' or 'child, who is in utero' means a member of the species homo sapiens, at any stage of development, who is carried in the womb.'.

(b) CLERICAL AMENDMENT- The table of chapters for part I of title 18, United States Code, is amended by inserting after the item relating to chapter 90 the following new item:

1841'.

SEC. 3. MILITARY JUSTICE SYSTEM.

(a) **PROTECTION OF UNBORN CHILDREN**- Subchapter X of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by inserting after section 919 (article 119) the following new section:

Sec. 919a. Art. 119a. Death or injury of an unborn child

`(a)(1) Any person subject to this chapter who engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365 of title 18) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section and shall, upon conviction, be punished by such punishment, other than death, as a court-martial may direct, which shall be consistent with the punishments prescribed by the President for that conduct had that injury or death occurred to the unborn child's mother.

`(2) An offense under this section does not require proof that--

`(i) the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

`(ii) the accused intended to cause the death of, or bodily injury to, the unborn child.

`(3) If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall, instead of being punished under paragraph (1), be punished as provided under sections 880, 918, and 919(a) of this title (articles 80, 118, and 119(a)) for intentionally killing or attempting to kill a human being.

`(4) Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section.

`(b) The provisions referred to in subsection (a) are sections 918, 919(a), 919(b)(2), 920(a), 922, 924, 926, and 928 of this title (articles 118, 119(a), 119(b)(2), 120(a), 122, 124, 126, and 128).

`(c) Nothing in this section shall be construed to permit the prosecution--

 `(1) of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

 `(2) of any person for any medical treatment of the pregnant woman or her unborn child; or

 `(3) of any woman with respect to her unborn child.

`(d) In this section, the term `unborn child' means a child in utero, and the term `child in utero' or `child, who is in utero' means a member of the species homo sapiens, at any stage of development, who is carried in the womb.'

(b) CLERICAL AMENDMENT- The table of sections at the beginning of such subchapter is amended by inserting after the item relating to section 919 the following new item:

 `919a. 119a. Death or injury of an unborn child.'

Crist, Juliana Vines. "

In the *Case Western Law Review* of 2010, Juliana Vines Crist's article speaks to the surface perception of tension between *Roe v. Wade* and Fetal Homicide. Crist articulates, "Even though fetal murder laws use the word "person," they do not confer *constitutional* personhood. [. . .] States can, and do, act to protect certain entities, even when those entities themselves have no rights. Moreover, whereas abortion mediates between the opposing interests of the state and woman, feticide laws pursue the same goals for both the woman and the state. [. . .] there is a clear difference between a pregnant woman consenting to an abortion and a nonconsensual attack on a woman that results in the loss of her pregnancy. The woman has a right to act; the attacker does not. Once we look below the surface, then, it becomes apparent that the fetal legislation need not be viewed as a threat to women's rights." (Juliana Vines Crist, 2010 pg 860-861)

Fetal Homicide Legislation supports the woman's right to reproductive autonomy as it recognizes "the right to carry a child to term is an oft-forgotten corollary of the right to abortion. These laws protect women in that sacred interest." (Julia Vines Crist, 2010, pg 854) Extending protection to the unborn Child of a woman who has chosen to carry the pregnancy to term does reiterate her right to determine the outcome of her pregnancy. "the right to carry a child to term is an oft-forgotten corollary of the right to abortion. These laws protect women in that sacred interest." (Julia Vines Crist, 2010, pg 854)

"Violence during pregnancy has been reported in as many as two out of every five pregnant women." And "In some instances the abuse does not simply continue into pregnancy, but is initiated during pregnancy." (Burch, Rebecca, and Gallup, Gordon, 2004, pg 243)

Deborah Tuerkheimer, professor of Criminal Law and Feminist Jurisprudence at DePaul University, states in her article "Conceptualizing Violence against Pregnant Women" that "the

Woman's pregnant state itself becomes a further mechanism of subordination: a victim's stake in the pregnancy heightens her vulnerability, intensifying the power differential between herself and the batterer." With the lack of decisive terms for the loss of her unborn child should violence against her cause such a loss without her consent, "She is perpetually reminded that she cannot protect that which she has chosen to bring into the world." (Tuerkheimer, 2006)